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# Hate crimes in Australia: Introducing punishment enhancers

Mark Walters\*

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*The documentation of hate crime has proliferated over the past 20 years. The influence of political lobbying and the efforts of activists during this time has seen the emergence of a new "identity politics" that has enabled the once silent minorities to be heard from every corner of the western world. In doing this, many countries have introduced hate crime legislation that specifically punishes offenders of crime motivated by prejudice. Yet local victims of hate crimes are not protected by hate crime laws as they are in the United States and the United Kingdom. This article calls for the implementation of hate crime laws throughout Australia in an attempt to recognise and protect the forgotten victims of hate crime. Included in this argument is a discussion on the impact that hate crimes have on the criminal justice system and society as a whole. In essence, will the emergence of greater legal protection impact on the prevalence of this kind of abuse? Furthermore, the question then arises, is it justifiable that new legislation be prescribed to specific groups, creating enhanced punishments for offenders?*

## INTRODUCTION

In America during the 1980s and 1990s, a social movement against discriminatory violence directed at minorities gained significant momentum. Legislative campaigns and lobby groups exerted pressure on governments to recognise the impact that bias crimes<sup>1</sup> were having on certain sectors of society. A strong alliance was formed by many rights-based organisations that voiced the need to create active legislation against offenders of such crimes. Over 20 years has passed since we first heard of hate crime laws. In America, almost every state has hate crime legislation.<sup>2</sup> The United Kingdom has also recognised the need to combat bias crimes and has introduced legislation against crimes motivated by racism and religion.<sup>3</sup> Yet Australia has chosen not to introduce hate crime legislation. Instead, it has only produced anti-discrimination laws and more limited crimes of public vilification.

Legislating against criminal conduct, that is motivated by prejudice or bias<sup>4</sup> evinced towards the victim (hate crime), produces a number of intrinsic difficulties to the jurisprudence of criminal law. While important to any decision as to whether hate crime legislation should be introduced, these difficulties do not prevent a solid and compelling argument for the introduction of hate crime legislation. The following questions and issues that will arise include:

1. The justification behind legislation that creates harsher penalties. What makes hate crimes worse than other acts of violence?

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\* Casual Lecturer in Law, Faculty of Law, University of New South Wales. I would like to thank Irene Nemes, Gail Mason and Stephen Tomsen for their helpful comments on an earlier version of this article. Special thanks go to Jill Hunter for her constant support and encouragement of my research.

<sup>1</sup> The phrases "hate crime" and "bias crime" will be used interchangeably throughout this article.

<sup>2</sup> See Lawrence F. *Punishing Hate* (Harvard University Press, Cambridge, 1999) for a full description of each State's legislation.

<sup>3</sup> Both American and UK legislation will be discussed in more detail below.

<sup>4</sup> The word *hate* has been used to describe these types of crime but they do not necessarily involve hatred per se, instead they are acts based on the bias or prejudice that the offender holds towards their victim. Such crimes may involve prejudice of race, ethnicity, sexual orientation and disability. In essence, the victim is targeted because he or she holds certain minority group characteristics.

2. Do hate crime laws have any real impact on criminal justice and protect victims, or are they simply symbolic?
3. The use of motive in determining culpability. The difficulties between the use of motive and intention under criminal law doctrine.
4. Difficulties in proving prejudice; in particular what happens when there are a number of different motives that the offender holds.

Each of these will be discussed below in an attempt to put forward an argument that Australia should legislate against hate crimes. In particular, this article will focus on homophobic violence as a main example of the severity and brutality of hate crimes, the effect they can have on communities and on wider society.

### HOW DOES HATE CRIME LEGISLATION WORK?

Hate crime legislation will often involve enhancing the punishment of an already criminal act. Most hate crime legislation is of this type. For example, an offender may commit the offence of assault. If the relevant elements of the offence are satisfied under the definition of the Act, the offender may be convicted of this crime. If, however, it is determined that the offender committed the offence of assault *because of* a prejudice or bias held towards the victim, the crime will become a hate crime. In this case, a penalty enhancement will be applied during sentencing.

Other crime statutes may create new substantive offences. Under this form, the Act will redefine an already existing crime as a new crime or as an aggravated crime.<sup>5</sup> Under either type of law it is imperative that the state contains an “intent standard”,<sup>6</sup> ie it must refer to the intention of the offender.

In general there are two types of hate crime legislation. The first creates offences based on a “hatred motivation” model, whereby the offender acts out of hatred for her or his victim’s ethnicity/sexuality/religion etc. The second is a “group selection” model. This requires the offender to select her or his victim from a particular protected group. The perpetrator’s motivation is not at issue, only that he has intentionally chosen someone because they are from that particular group.<sup>7</sup> Under both, the sentence of an already criminal act is typically increased where the offender has committed the bias crime. Most hate crime laws are of this type.

### Hate crime legislation: US and UK hate crime laws

#### *US legislation*

During the 1980s and 1990s, a proliferation of hate crime legislation was enacted in the US. Virtually every single state in America has enacted hate crime legislation. At first, most pieces of legislation covered crimes of hate which were racially motivated. Other types of hate crime followed and included crimes that were motivated by bias based on religion, disability, sexual orientation, national origin and ancestry.<sup>8</sup>

However, many states have rejected sexual orientation as a type of hate crime. Lawrence notes that Texas State Representative, Warren Chisum, exclaimed that by including sexual orientation, these laws “would give minority status to a human act, as opposed to being born black or brown or a woman, which are unavoidable indoctrinations into a minority group [the bill says] you can now opt to be a minority by making a human thought”.<sup>9</sup> The fight for inclusion continued against a mighty backlash of homophobia. An Indiana Representative, Woody Burton, stated that including “homosexuals” in hate crime statutes would be “opening the door toward ... teaching that kind of

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<sup>5</sup> See, eg the *Crime and Disorder Act 1998* (UK) discussed later in this article.

<sup>6</sup> Jenness V and Grattet R, *Making Hate a Crime* (Russell Sage Foundation, New York, 2001) p 77.

<sup>7</sup> For a greater in-depth look at the different types of hate crime legislation in the US, see Lawrence, n 2, pp 29ff; Jacobs J and Potter K, *Hate Crimes* (Oxford University Press, New York, 1998) pp 29ff; Jenness and Grattet, n 6, pp 77ff.

<sup>8</sup> See Lawrence, n 2; Jenness and Grattet, n 6; Jacobs and Potter, n 7.

<sup>9</sup> Eskenazi S, “Chisum Casts Blame at Gay Victims” *Austin American Statesman* (17 February 1995) quoted in Lawrence, n 2, p 18. Chisum’s statement suggests that sexual orientation is a mere thought. It excludes any possibility that sexuality is inherent or becomes a part of the self whilst growing up. Even if it could be suggested that sexuality is not unchangeable, there is certainly no irrefutable scientific evidence to suggest that sexuality is a matter of logical choice.

lifestyle to our children.”<sup>10</sup> The ways in which these statements are phrased are consumed with homophobic and misogynistic overtones. Other extreme hostility towards gay and lesbian rights has come from fundamentalist Christians. Herman points out that gay rights are perceived by these groups as “special rights” dissimilar to other minority rights and that sexuality is a matter of choice (and therefore sin), yet this contradicts the essentialist notions of sexual identity that many conservatives hang on to in other contexts.<sup>11</sup> Notwithstanding this homophobic backlash, 29 States now have hate crime legislation that covers sexual orientation.

Such legislation is not homogenous; there are in fact several ways in which to legislate in this area. The legislative language used in each State in the US is different, thus it is difficult to place each state into either the “hatred motivation” or “group selection” model, mentioned previously, without ambiguity. In some States the words “intentionally selects” have been used (eg, by Virginia).<sup>12</sup> More commonly used phrases are, “because of” or “by reason of”. Under these phrases, a penalty enhancement will be made where the offender has committed a parallel offence, but it was committed *because of or by reason of* the victim’s sexuality/race/religion etc.<sup>13</sup>

For example, the legislation in Maine reads as follows:

§1151. The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation of that person or of the owner or occupant of that property.<sup>14</sup>

Under this Act, the offender’s sentence will be increased when he or she is convicted of an offence which had been committed because of one of the specified characteristics of the victim. It is also clear that under this Act hatred for the victim is not a prerequisite as it may be under other statutes (hatred model). In court, the defendant’s intention must be proved. A claim of hatred towards the victim’s identity is not necessary, just that the defendant intentionally selected a victim from the particular group (group selection model). However, under the hatred model it is essential to prove that the defendant acted with hatred towards their victim.

The connection between the perpetrators selection of a particular victim *because of* that person’s race etc must be conclusively established. The offender will then fall under the Act and the court will enhance the punishment for the original crime. Other *because of* legislation in the US works similarly to this, but may include an intent element such as malice or ill will.<sup>15</sup> These fall into the “hatred model” and require a more onerous burden to prove the actual malice or ill will towards the victim. Indeed, this model will give greater protection to defendants from wrongly being accused of a hate crime, therefore avoiding an enhanced sentence, as will be explained later on.

The other form of legislation is to create a new substantive law. These types of legislation are less popular, not least because they involve the redefining of a whole new offence which will become a hate crime. Most of these types of statutes provide new substantive offences of intimidation and vandalism.<sup>16</sup> An example is in California:

422.6 (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.<sup>17</sup>

<sup>10</sup> Lawrence, n 2, p 19.

<sup>11</sup> Herman D, *The Antigay Agenda: Orthodox Vision and the Christian Right* (University of Chicago Press, Chicago, 1997).

<sup>12</sup> Code of Virginia, Title 18.2, Ch 4, ss 18.2-57.

<sup>13</sup> See Lawrence, n 2. For an entire coverage of US State statutes based on different models of hate crime, see appendices B-G.

<sup>14</sup> Criminal Code of Maine, Title 17-A, Pt 3, Ch 47, s 1151.

<sup>15</sup> See, eg General Laws of Massachusetts, Part 1, Title 2, Ch 22C, s 32, which includes actions motivated by “bigotry and bias”.

<sup>16</sup> In many States in Australia, anti-vilification laws creating substantive laws have been enacted (these are discussed later on).

<sup>17</sup> California Penal Code Ch 1 and Ch 2, s 422.55 which reads as follows: “For purposes of this title, and for purposes of all other state law unless an explicit provision of law or the context clearly requires a different meaning, the following shall apply:

Under this legislation, a new substantive law has been enacted that is a “pure” bias crime.<sup>18</sup> The offender’s actions must therefore fall under the specific wording of this statute before it becomes a hate crime. It therefore does not run parallel to another offence like that of assault, but becomes a whole new crime.

The US has come a long way in introducing hate crime legislation. Unfortunately, sexual orientation is only encompassed in 29 States’ legislation. Thus exclusion of crimes based on anti-homosexual hatred or bias is yet to be implemented by many of the States. This exclusion triggers a symbolic message. If such crimes were to be sanctioned under hate crime laws it would mean that homophobic violence would stand on an equal pegging with the victimisation of other minority groups that are covered. The exclusion of sexual orientation as a hate crime in many States, in effect, rejects the legitimacy of homosexuality, as Chisum does above. Regrettably, a message of indifference is then sent out towards homophobia.

### UK legislation

In the UK, similar legislation was enacted under the *Crime and Disorder Act 1998* (UK). At first, the legislation only included racially aggravated crimes set out under ss 28-32 and 96. However, s 39 of the *Anti-terrorism, Crime and Security Act 2001* (UK) amended the Act to include religiously aggravated offences. Section 40 also amended s 27(3) of the *Public Order Act 1986* (UK) to increase the penalty for racial hatred offences from two years to seven. Section 28 of the *Crime and Disorder Act* now prescribes that:

- (1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if –
- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group; or
  - (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

Section 82 of the Act provides for increased sentences for racially and religiously motivated crime.<sup>19</sup> The legislation is similar to many US statutes that include sentence enhancers, but the *Crime and Disorder Act* also incorporates “hostility” into the equation, thus falling into the hatred model.

The *Criminal Justice Act 2003* (UK) also provides for increases in sentencing for aggravated crimes related to race, religion, disability and sexual orientation (ss 145 and 146). This means that the court may increase the sentence of an offence where it is demonstrated that hostility was evinced towards the victim because of the perceived race, religion, disability or sexual orientation of the victim. However, this does not provide for a separate offence in itself, but instead for the possibility of an increased sentence as an aggravating factor. Discussion on whether aggravating factors in sentencing are sufficient in dealing with hate crimes, as against creating separate offences of aggravation or punishment enhancement, will be discussed later in this article.

While racially and religiously aggravated crime has been incorporated under the *Crime and Disorder Act 1998*, the British Government refuses to extend other socially penalised groups to the legislative list. However, to include race and religion, but not other groups, is unjustified.<sup>20</sup> The fact

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(a) ‘Hate crime’ means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (1) Disability; (2) Gender; (3) Nationality; (4) Race or ethnicity; (5) Religion; (6) Sexual orientation; (7) Association with a person or group with one or more of these actual or perceived characteristics. (b) ‘Hate crime’ includes, but is not limited to, a violation of Section 422.6.”

<sup>18</sup> For a list of all pure bias crime and penalty enhancement legislation, see Lawrence, n 2, Appendix A.

<sup>19</sup> Iganski identifies three expectations behind the legislation. The first was as a deterrent to possible offenders; second, to promote social cohesion; and, third, as a more effective response to such incidents within the criminal justice system: see Iganski P, “Why make ‘hate’ a crime?” (1999) 19(3) *Critical Social Policy* 60.

<sup>20</sup> See Standing Committee B, *Criminal Justice Bill* (House of Commons, 30 January 2003) (Simon Hughes at Column No 756), available at <http://www.publications.parliament.uk/pa/cm200203/cmstand/b/st030130/pm/30130s10.htm> viewed 15 July 2005. Indeed Hughes, when discussing this issue, states this very point: “I am troubled by the fact that we are putting into one

that a hate crime is motivated by the minority characteristics and vulnerability of a victim is what makes the crime more serious. That is, it goes beyond the harm caused by other violent acts as it penetrates the core identity of the individual and her or his wider community. Arguments that victims of racism are more deserving of a protective status than other identifiable perpetrated groups are tenuous. Gay men and lesbians and people with disabilities, amongst others, can equally suffer from identity-motivated hate crime.<sup>21</sup>

The UK has made the first steps in protecting vilified groups of people through legislation. While it is only race and religion that is included in the Act, other groups are likely to be added (as was the case in the US) in the future. In fact, further discussion has already begun on creating new laws proscribing incitement of religious hatred.<sup>22</sup> As more minority groups are identified as suffering from hate crime abuse, and as evidence is produced to show the disproportionate harm suffered to the victim and society, it is inevitable that the government will add other groups to the list covered by hate crime legislation.

### **Justification of hate crime legislation**

Arguments of retribution and consequential punishment theory are important in determining whether hate crime legislation is justifiable. Legislating against hate crimes must be based on the principle of proportionality. That is to say hate crimes are often more severe than other parallel crimes as their impact on the individual victim or society is greater. This will be evidenced in detail below under "Severity of Hate Crimes".

Whether a perpetrator is guilty of any offence will be closely linked to their mental state. An act which causes injury to an individual does not, of itself, determine the punishment that the perpetrator will receive. An intention to harm will define her or his culpability. Intending to cause harm will then often help to determine how severely he or she will be punished. For example, manslaughter carries a lesser sentence than murder, as it is the offender's intention to kill which will often define their punishment.<sup>23</sup> The culpability of the offender will then be linked to the amount of harm that results from their act. Punishment will reflect the proportion of harm once the defendant has been deemed to be culpable. Thus, the harm caused to the individual *and* society will be intrinsically connected to determining the appropriate sentence.

Other crimes that have harsher punishments linked to the severity of the act include: death by dangerous driving,<sup>24</sup> burglary<sup>25</sup> and armed robbery.<sup>26</sup> These all have comparable parallel crimes, yet their severity is deemed more severe because they have a greater impact on the victim and/or society.

The severity of hate crimes, while central to this argument, is not the only justification behind introducing new legislation. Other important themes include the symbolic value and express denunciation created by new penalty enhancers.

### **Is hate crime legislation simply symbolic?**

As do many commentators on hate crime legislation, Iganski maintains that hate crime legislation is symbolic and rarely achieves its aims and objectives. In legislating against hate, the state is simply appeasing those who desire the legislation, thus stopping social unrest<sup>27</sup> (this will also be discussed further under "identity politics" below). He points to US States, where hate crime legislation has

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category prejudices against those who are Sikhs or who are black, but that we are not registering the fact that people can suffer terrible crimes because they have a disability or because they are gay or female."

<sup>21</sup> Discussed further under "New Legislation for Australia".

<sup>22</sup> Queen's Speech (17th May 2005, UK); transcript available at <http://www.number-10.gov.uk/output/Page7488.asp> viewed 7 July 2005.

<sup>23</sup> Though in some rare cases, convictions for manslaughter have received greater sentences than those for murder.

<sup>24</sup> See *Crimes Act 1900* (NSW), s 52A.

<sup>25</sup> See *Crimes Act 1900* (NSW), ss 109-113.

<sup>26</sup> See *Crimes Act 1900* (NSW), s 98.

<sup>27</sup> Iganski, n 19. See generally Jacobs and Potter, n 7.

purportedly had an adverse affect on society, causing racial tension and aggravation when cases are sensationalised through the media.<sup>28</sup>

However, the symbolic value which hate crime legislation conveys is only part of the momentous effect such legislation can have.<sup>29</sup> Though the symbol it serves is important, it is not the only aim that hate crime legislation achieves. It also provides the promotion of recognition and support to groups who are fearful of the abuse their community suffers. It makes a direct statement to potential offenders that any act of prejudice is utterly prohibited. In doing this, it does not fail to achieve its aims and objectives. These are important aims of hate crime legislation that although they appear to be “symbolic”, serve an important role in combating hate crimes. Further to this, a more important aim is established: to punish a more severe crime with a more severe punishment and to prevent future offending. None of these aims mentioned above act only to score political points as is often suggested.<sup>30</sup> Hate crimes are of higher severity compared with other violent acts.<sup>31</sup> In accordance with punishment policy and the criminal law, such crimes must be represented with harsher penalties. Arguments put forward that hate crime laws are futile and simply symbolic are thus flawed.

### **The expressive value of punishment**

Criminal punishment carries with it substantial stigma. Legislation is instrumental in denouncing an act as immoral and socially unacceptable. Therefore, potential wrongdoers are deterred from acting in a way that is prohibited by law in order to avoid condemnation from others.<sup>32</sup> This will not make criminal activity obsolete, but it can have the impact of reducing levels of activity no longer deemed acceptable in the public eye.

This is a result of public disapproval of the criminal act for which a person has been convicted. The denunciation of a wrongdoer can have the effect of ostracising that person from her or his community.<sup>33</sup>

Denunciation is important to the argument of introducing enhanced penalties under a separate criminal act of bias violence. It sends a strong message out which will stigmatise the activity, such as “gay bashing” and racist violence. The use of legislation as a means of combating bias violence creates a signal of what behaviour is approved and what is not. The legislation denounces the now criminal behaviour, which in turn announces that opposite behaviour is to be welcomed. A society without prejudice is to be embraced. Crimes of violence produce harm and encroach on values of a violence-free society, but they do not encroach on values of a violence-free *and* homophobic/racist-free society. The added breach of values adds to the severity of the crime. If bias violence is not expressly prohibited by legislation, the message conveyed can be, at the extreme, a conveyance of neutrality of the issue or, at the very least, that fighting homophobia/racism is not one of the community’s highest values.<sup>34</sup>

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<sup>28</sup> Iganski, n 19. See also Morgan J, “US Hate Crime Legislation: A Legal Model to Avoid in Australia” (2002) 38(1) *Journal of Sociology* 25, where Morgan goes as far as to claim that, “Hate crime legislation is the source of serious social disquiet and acrimony in the US”, yet she does not refer to any empirical evidence that suggest that this is the case throughout America.

<sup>29</sup> Further, Moran and Skeggs pose the question: “Is the demand for the violence of the law informed by the very emotions that it seeks to condemn?” In effect, we are in a paradoxical contradiction when we use the hate of law to fight the hate of crime. However, this assumes that we hate those who hate and this is the only reason we wish to legislate. We do not need to hate or use hate to enact legislation, we do so as an act of “just deserts” – believing that they must receive what they deserve, this does not mean we hate them. It means that punishment must fit the crime – a matter of fairness and justice, not hate. We also wish to deter people from committing the crime again. This does not mean we harness desires of hate in wanting to deter. See Moran L and Skeggs B, *Sexuality and the Politics of Violence and Safety* (Routledge, London and New York, 2004) p 29.

<sup>30</sup> Moran and Skeggs, n 29.

<sup>31</sup> Detailed evidence of this statement follows later in the article.

<sup>32</sup> Hart HCH, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, Oxford, 1968). Hart states that a shift in retributive thinking occurred which gives “value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offence”: pp 234-235.

<sup>33</sup> See Walker N, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Oxford, Blackwell, 1980) p 22.

<sup>34</sup> See Lawrence, n 2 at p 168 for examples of the influence that legislation can have on people’s attitudes towards particular acts.

## THE SEVERITY OF HATE CRIMES

Academics and government agencies alike have spent much time and resources researching crime surveys in general, and various aspects of victimisation in particular, over the past 30 years. However, in Australia it has only been over the past 10-15 years that the trend in victimisation analysis has spilled over into more specific areas such as "hate crime" offending. Australian society has witnessed the persecution of Indigenous citizens for many years. In more recent years, crimes motivated by hate appear to be a serious problem. The desecration of Jewish cemeteries and synagogues,<sup>35</sup> violence against people because of their race or ethnicity<sup>36</sup> are just a few types of hate crime that make up the wider picture of hate crimes carried out throughout Australia on a daily basis. One newer development that has emerged over the past 10-15 years is the documentation of homophobic violence.

In 1995, the NSW Police released "Out the of Blue",<sup>37</sup> a report surveying 297 gay men and lesbians at a Sydney Gay and Lesbian Mardi Gras Fair Day in 1994. The results alarmed many, reporting that gay men were four times more likely to be assaulted and lesbians six times more likely to be assaulted than other men and women. This was not the first piece of Australian research to determine the prevalence of anti-gay and lesbian violence. In 1994, the Gay Men and Lesbians Discrimination group (GLAD) in Victoria surveyed over 1000 gay men and lesbians on homophobic violence, discrimination and harassment. The survey found that 20% of gay men and 11% of lesbians had experienced physical homophobic violence.<sup>38</sup> However, throughout the rest of the 1990s and up to December 2003, no other large-scale research project had been carried out in NSW specifically on homophobic violence.

In December 2003, the Attorney-General's Department in conjunction with the Network of Government Agencies (NOGA) published their report, "You shouldn't have to hide to be safe".<sup>39</sup> Over 600 people responded to a survey that enabled the Department to make a thorough assessment and analysis of homophobic violence across NSW. Respondents were asked about the most common form of abuse suffered over the past 12 months. Six per cent had suffered from physical attacks.<sup>40</sup> Sixteen per cent of all those questioned had been victims of some kind of assault (ie, had been threatened with force or physically attacked). This is compared to the victimisation rate (general population)<sup>41</sup> for assault (a person who was threatened with force or physically attacked) in NSW, which was estimated at 3.8% in 2004.<sup>42</sup> Because of this recent documentation of homophobic

<sup>35</sup> See Varova S, Pearson N and Thomas T, "Racism: The Current Experience" (1995) (8) *Without Prejudice* (Melbourne) 10 (Collection of three papers presented at the National Conference "Without Prejudice: Racism and Antisemitism in Contemporary Australia", Melbourne, 1994); Nemes I, "Antisemitic hostility" in *Faces of Hate: Hate Crime in Australia* (Federation Press, 1997) pp 44-74.

<sup>36</sup> See Atkinson J, "Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward" (2001) ILB 62; Cunneen C, "Hysteria and Hate: The Vilification of Aboriginal and Torres Strait Islander People" in *Faces of Hate: Hate Crime in Australia* (Federation Press, 1997) pp 137-161; Moss I, "The National Inquiry into Racist Violence: First Impressions" (1990) (1) *Without Prejudice* (Melbourne) 7; Greason D, "Australia's Racist Far Right" in *Faces of Hate: Hate Crime in Australia* (Federation Press, 1997) pp 188-213.

<sup>37</sup> NSW Police Service and Price Waterhouse Urwick, "Out of the Blue Survey: A Police Survey of Violence and Harassment Against Gay Men and Lesbians" (NSW Police Service, Sydney, 1994). Previous to this, community surveys in NSW and Vic and SA had been carried out. See NSW surveys: Cox G, "The Streetwatch Report: A Study into Violence Against Lesbian and Gay Men" (Lesbian and Gay Anti-Violence Project, Sydney, 1990); Cox G, "The Count and Counter Report: A Study into Hate Related Violence Against Lesbians and Gay Men" (Gay and Lesbian Rights Lobby, Sydney, 1994); Schembri A, "The Off Our Backs Report" (Gay and Lesbian Rights Lobby, Sydney, 1992).

<sup>38</sup> Gay Men and Lesbians Against Discrimination (GLAD) Melbourne, "Not A Day Goes By: Report on the GLAD Survey into the Discrimination and Violence Against Lesbians and Gay Men in Victoria" (1994).

<sup>39</sup> Attorney-General (NSW), "You shouldn't have to hide to be safe": A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in New South Wales" (December 2003).

<sup>40</sup> Forty-eight per cent of respondents stated they had suffered verbal abuse; 24% had suffered harassment; 10% of respondents had been threatened with physical violence or assault. The lowest rate of abuse was for sexual attacks at 1%. Attorney-General (NSW), n 39, s 6.1, p 35.

<sup>41</sup> These are unrecorded crime levels collated from the Australian Bureau of Statistics, *Crime and Safety* (NSW, 2004) at <http://www.abs.gov.au/Ausstats/abs@.nsf/0/075b378cc9b92bc4ca2568a90013942e?OpenDocument> viewed 2 February 2005.

<sup>42</sup> Or 200,700 people: see Australian Bureau of Statistics, n 41.



violence and the fact that the frequency of homophobic violence is endemic to many parts of Australia,<sup>43</sup> this article will draw frequently from empirical research on homophobic violence and the effect that homophobic violence has on victims and society. Drawing from this research, the article hopes to lay out evidence that is applicable to all hate crimes.

### **The physical severity of bias violence compared with aggravated assault**

As suggested above, in order to distinguish between the severity of each crime, we must look at the culpability of the defendant and the harm he or she has caused. Essential to the contention that harsher penalties are required for homophobic assaults is to evaluate how harmful they are to the individual or society and that the offender is culpable for the crime.

It has been suggested that there is no empirical research to show that victims of hate crime suffer more physical harm than other crimes in the same category.<sup>44</sup> However, there is a solid base of empirical evidence that shows that hate crimes are more violent and cause more harm to their victims than other victims in general. Brian Levin notes that not only are hate crime attacks more likely to involve physical attacks than crime generally, but they are likely to cause more harm.<sup>45</sup> Levin notes that hate crimes are twice as likely to cause injury than other similar crimes. This means that a bias attack will invariably cause a greater amount of *harm* than a parallel crime of assault. For example, a victim who is perceived to be gay or lesbian is twice as likely to suffer injury when attacked; this indicates that such an attack is likely to carry a higher level of brutality. This assertion is supported by the fact that victims of homophobic attacks are also four times more likely to be hospitalised.<sup>46</sup> Levin and McDervitt also demonstrate the severity of hate crimes.<sup>47</sup> They refer to the Boston project that looked at hate crimes between 1983 and 1987. In doing this they found that 75% of victims who were assaulted suffered physical injury; this was compared to the national average for assault where 30% of victims suffered physical injury.<sup>48</sup> Local research that documents this was carried out in 2002 by Tomsen. Tomsen looked at the growing concern about the disproportionate number of recorded killings of gay men in NSW during the early 1990s. The study looked at a variety of case studies showing that many attacks motivated by gay hatred were so brutal that they led to the death of the victim.<sup>49</sup> Empirical evidence thus shows the severity of harm suffered by hate crime victims for the same offence is more severe.<sup>50</sup>

Because the harm caused by bias violence is greater, a more severe punishment is required. It is proportionate that for an assault which is more severe and which creates more harm, a more severe punishment is needed.

It is also important to differentiate bias crime from “aggravated assault”. Under sentencing legislation in NSW, a judge may take into account aggravating and mitigating factors when

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<sup>43</sup> See Gay Men and Lesbians Against Discrimination (GLAD), n 38; NSW Police Service and Price Waterhouse Urwick, “Out of the Blue Survey”, n 37; Mason G, *Violence Against Lesbians and Gay Men* (Australian Institute of Criminology, Canberra, 1993). For further analysis of homophobic abuse throughout Australia, see Mason G and Tomsen S (eds), *Homophobic Violence* (Hawkins Press, Sydney, 1997).

<sup>44</sup> Jacobs and Potter, n 7, pp 82-84.

<sup>45</sup> Levin B, “Bias Crimes: A Theoretical and Practical Overview” (1992-1993) 4 *Stanford Law & Policy Review* 165.

<sup>46</sup> Levin B, “Hate Crime: Worse by Definition” (1999) 15(1) *Journal of Contemporary Justice* 6 at 15.

<sup>47</sup> Levin B and McDevitt J, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* (Plenum, New York, 1993).

<sup>48</sup> See also Kuehnle K and Sullivan A, “Patterns of Anti-Gay Violence: An Analysis of Incident Characteristics and Victim Reporting” (2001) 16(9) *Journal of Interpersonal Violence* 928. The authors found that 88.8% of anti-gay offences reported to the police by gay men, lesbians, transgendered people and bisexuals were personal in nature (these offences included: assault with and without a weapon, murder, robbery, sexual assault, intimidation, verbal harassment and mail harassment). Furthermore, 55.3% of incidents against gay men were of a serious personal nature (assault with and without a weapon, murder, robbery, sexual assault). Fifty per cent had been of a serious personal nature, including murder, robbery, sexual assault and assault with or without a weapon.

<sup>49</sup> Tomsen S, *Hatred, Murder and Male Honour: Anti-homosexual Homicides in New South Wales 1980-2000* (Research and Public Policy Series No. 43, Australian Institute of Criminology, 2002).

<sup>50</sup> It is irrelevant that a more severe assault may be caught under a more severe crime – like aggravated assault. The fact is that the offence of assault is evidenced as often being consistently more severe for gay and lesbians than it is for other citizens (they are hospitalised more often and suffer more injury, including the severity of psychological harm). In this respect, a different crime is needed to reflect the different impact of the offence.

sentencing. Under s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), in determining an appropriate sentence for an offence, the court may pay additional regard to the fact that the:

offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).<sup>51</sup>

This means that the court may pay regard to violent acts motivated by some forms of hatred when deciding upon sentence (similar to the *Criminal Justice Act 2003* in the UK). This reflects the severity of bias violence by acknowledging that offences motivated by hatred or prejudice for a victim, based on the characteristics of that person, are *potentially* aggravating. In other words, the offence is deemed more severe and in turn a more severe punishment is needed. While, eg, an offence of assault may be aggravated by the fact that it was motivated by hate does not in itself set forth a new crime for bias violence. It does not set bias violence apart from other forms of violence as a criminal act in itself. It is the purpose of this article to show that such acts are different from assaults that are aggravated, and that the severity of bias violence goes beyond aggravation and into a new realm where offences based on hatred are proven to be more brutal and harmful. They are, through their frequently brutal character, almost always aggravated. An offence that is always aggravated can no longer be an aggravated offence. It is not aggravating anything; it is a different offence in itself. The offence of homophobic assault is often almost always more detrimental to the individual and the community and therefore does not merely sometimes become more severe due to certain factors. It must therefore be treated differently. For example, a murder is not just an aggravated form of an assault dependent on the death of the victim – it is qualitatively different. The offence of murder must be characterised under legislation in order to punish, deter and to protect; so too must offences that are qualitatively different in order that they too can act to punish proportionately, deter offenders and protect the public.

### **The psychological severity of bias violence**

The brutality of bias violence is not only demonstrated by physical severity as shown by hospitalisation levels, it is also evidenced in higher levels of psychological harm.

The psychological harm caused by an act of violence can often appear to be less tangible than a physical harm. We rarely witness the traumatic effects that a severe beating can have on someone after the physical wounds have healed. The severity of any psychological harm then, can often be harder to prove.

The differential impact of certain crimes is well documented. Key factors in this determination are “vulnerability”, “resources”, “isolation” and “previous experiences”.<sup>52</sup> Linked to these are the differential impacts that hate crimes have on individuals.

Levin notes that research by the National Institute Against Prejudice and Violence<sup>53</sup> found that victims of hate-related criminal and non-criminal attacks experienced 21% *more* adverse psychological and physiological symptoms than those who had suffered similar attacks that were not hate related. Herek et al reported that

Lesbian and gay survivors of hate crimes showed significantly more signs of psychological distress – including depression, stress, and anger – than did lesbian and gay survivors of comparable non-bias-motivated crimes.<sup>54</sup>

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<sup>51</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(h).

<sup>52</sup> See Skogan G, “The Fear of Crime and its Behavioural Implications” in Fattah E (ed), *From Crime Policy to Victim Policy* (London; Macmillan 1986).

<sup>53</sup> National Institute Against Prejudice and Violence, *The Ethnoviolence Project* (Institute Report No 1, 1986); Baltimore quoted in Levin, n 46, p 17.

<sup>54</sup> Herek G, Cogan J and Gillis J, “The Impact of Hate Crime Victimization” (Paper presented at a congressional briefing co-sponsored by the American Psychological Association and the Society for the Psychological Study of Social Issues, Washington, DC, November, 1997). A summary of the findings are found at <http://www.apa.org/ppo/issues/pherek.html> viewed 2 March 2004.

Distress of victims was “heightened” due to “personal danger” and “vulnerability” associated with them belonging to the gay and lesbian community.<sup>55</sup> This suggests that, in addition to the sense of vulnerability many victims of crime suffer, gay and lesbian victims suffer further psychological damage because their sexual orientation is an important part of who they are. As a result, they become isolated from the general public. Herek et al also note that the duration of psychological harm can last longer for victims of bias abuse. They found that victims of hate crime suffered from prolonged periods of “depression, stress and anger for as long as five years after their victimization occurred”.<sup>56</sup> In contrast, the psychological harm suffered by other non-hate-related victims showed vast improvements within two years.<sup>57</sup> Empirical evidence thus suggests that the psychological harm suffered by victims of bias violence will be greater.

Frequent evidence from “You shouldn’t have to hide to be safe” also reflects the oppressive and destructive nature of homophobic violence. It recorded that 66% of respondents who had suffered a homophobic attack or had concerns about homophobic violence had significantly modified their behaviour (eg, by dressing differently, or avoided showing affection to their partners in public). This evidence suggests psychological harm that has repressed an individual self into changing so as to protect their safety. Further to this, 50% were stressed and worried, 32% hid their sexuality as a result and 28% now suffer from depression.<sup>58</sup> Herek et al found that while victims of other crimes will modify their behaviour as a result of their trauma, the adverse effect will not be as great as it would be to someone where the attack goes to the centre of their identity.<sup>59</sup>

### **The wider impact on the specific communities and society as a whole**

It is not only the individual victim that suffers from these key factors of hate crime abuse. Its impact has far-reaching implications for the social group as a whole. The isolation effect mentioned above does not only impact on the individual, but impacts upon the gay and lesbian population as a whole. As a result of homophobic violence, its proliferation and documentation in the press and through advocacy campaigns, a clear message of *danger* to the gay and lesbian community is sent out. This is evidenced above in the NSW research. Since 1994 there has been a 15% increase amongst gay and lesbian people actively hiding their sexuality or acting specifically in order to avoid homophobic attacks from the general public.<sup>60</sup> The oppressive nature of homophobic violence creates immense isolation, fear for one’s safety, feelings of vulnerability and persecution. Victims can be left helpless as it is feared the state does not sympathise with their plight. Other like people in this social group and their families may also fear the same fate. Some people in society may feel sympathetic and want to help, but do not for fear that they may be targeted.<sup>61</sup> A state of panic ensues whereby members of the social group feel helpless. The unsympathetic approach traditionally made by the police creates further isolation.<sup>62</sup> The impact this has on the gay and lesbian community further demonstrates the potential harm of bias violence.

The increased severity of psychological and physical harm,<sup>63</sup> and the fact that physical attacks are more prevalent within specific communities becomes part of the wider picture also affecting society as a whole. In its entirety, this evidence gives rise to the view that it is time to legislate. The frequent severity under each category of physical, psychological, community and societal harm is overwhelming. Its impact has far-reaching effects on both the victim and society.

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<sup>55</sup> Herek et al, n 54.

<sup>56</sup> Herek et al, n 54.

<sup>57</sup> Herek et al, n 54.

<sup>58</sup> Attorney-General (NSW), n 39, s 8.1, p 51.

<sup>59</sup> See Herek et al, n 54.

<sup>60</sup> Attorney-General (NSW), n 39, s 9.1, p 55.

<sup>61</sup> See Lawrence, n 2, pp 43 and 44.

<sup>62</sup> See Stanko E and Curry P, “Homophobic Violence and The Self ‘At Risk’: Interrogating The Boundaries” (1997) 6 (4) *Social & Legal Studies* 513; Tomsen S, “The Political Contradictions of Policing and Countering Anti-Gay Violence in New South Wales” (1993) 5 (2) *Current Issues in Criminal Justice* 209 and Thompson S, “Hate Crimes Against Gays and Lesbians: A New South Wales Police Response” in Mason and Tomsen, n 43, p 132.

<sup>63</sup> The fact that psychological damage is more severe amongst gay and lesbian victims is also important, this is discussed along with new punishment proposals later in this article.

## SOME JURISPRUDENTIAL AND POLITICAL ISSUES CONCERNING HATE CRIME LEGISLATION

### Motive

Motive is a problematic issue that troubles many commentators on hate crime legislation.<sup>64</sup> A person cannot ordinarily be found guilty of a serious crime unless there is an actus reus (guilty act) and mens rea (guilty mind). The mens rea element of an offence will be the degree of intent required before the act becomes criminal. The intention element of an offence will normally be defined under the offence when assessing the defendant's culpability. Yet intention is really something that is assumed. Attempts to give intention a definition are futile as it will vary between different offences.<sup>65</sup> The person who holds a gun to someone's head and pulls the trigger will be assumed to have had the prerequisite intention to cause the death of her or his victim. There is not normally an investigation into the offender's actual mental state (unless, eg, an issue of capacity arises). The jury are left to assume that the defendant intended to kill her or his victim, as it is a natural consequence of the defendant's actions.

Motive, on the other hand, is not an element of a crime. Motive concerns the reasons why the offender commits the offence. It is therefore to be distinguished from intention. The consideration of motive would require a much higher level of investigation into the reasons behind why the offender committed the offence. It would thus require the prosecution to prove the reason why the defendant committed the crime beyond reasonable doubt. This would be an onerous and an extremely difficult task.<sup>66</sup> However, evidence of motive may be admissible and relevant to proving intention in court.<sup>67</sup>

The difference between motive and intention is perhaps one based on policy rather than logic. The courts cannot entertain lengthy investigations into the reasons behind why the offender committed the offence, not least because that knowledge is within the offenders mind only, but because it would be too difficult for the prosecution to prove the motive beyond a reasonable doubt. However, what constitutes intention or motive can be seen as a matter of construction depending on what act is being criminalised. An intent element within a crime will depend on the offence's definition of that element of the crime. Mental states that fall outside the definition of intention will ultimately be motives. This distinction turns on the prescribed elements of the crime. What is intention in one case may be totally different in another and may even concern a matter of motivation.<sup>68</sup>

Norrie makes much of this tenuous distinction.<sup>69</sup> It is impossible in reality for someone to form intentions without some form of motive; they are intrinsically a part of each other. Indeed, while motive is distinguished as irrelevant to the culpability of the offender, it is in reality simply quite frequently suppressed.<sup>70</sup> In fact motive comes into question in determining intention quite often. In burglary cases, eg, the court will ask not whether the offender intended to break into the house, but whether they entered with the intent to commit an indictable offence.<sup>71</sup> Therefore, although the court does not refer to the word "motivation", they are in reality asking what the motive of the offender was. In fact, motive plays a role in all specific intent crimes, as well as determining areas within criminal capacity including duress and necessity.<sup>72</sup>

<sup>64</sup> For arguments against the use of motive in the criminal law, see Uhrich C, "Hate Crime Legislation: A Policy Analysis" (1999) 36 *Houston Law Review* 1467, pp 1512-1519 and Morsch J, "The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation" 82 *Journal of Criminal Law & Criminology* 659.

<sup>65</sup> See Norrie A, *Crime, Reason and History* (Weidenfield and Nicolson, London, 1993) Ch 3; Lawrence, n 2, p 108.

<sup>66</sup> See Uhrich, n 64 at 1513.

<sup>67</sup> *R v Clarke* (1927) 40 CLR 227 at 232 per Isaacs ACJ – the motive was strong evidence of state of mind; *R v Neilan* (1991) 52 A Crim R 303 at 322; *Meissner v R* (1995) 184 CLR 132 at 144 per Brennan, Toohey and McHugh JJ; 80 A Crim R 308; *De Gruchy v R* (2002) 211 CLR 85; 132 A Crim R 453; 190 ALR 441 at 446 per Gaudron, McHugh and Hayne JJ.

<sup>68</sup> Lawrence, n 2, takes this argument into more detail at p 108.

<sup>69</sup> Norrie, n 65, p 37.

<sup>70</sup> The distinction between motive and intention "persistently erupts within legal discourse": see Norrie, n 65, p 40.

<sup>71</sup> *Crimes Act 1900* (NSW), s 109.

<sup>72</sup> See Taslitz A, "Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong" (1999) *Boston College Law Review* 739.

Motive does not present a jurisprudential problem to all hate crime laws. As mentioned previously, most hate crime laws are penalty enhancement laws that work only at the sentencing stage. Courts will often pay regard to the motivation of the crime at sentencing. This is an accepted procedure which will help the court determine mitigating or aggravating factors of the crime.<sup>73</sup> Therefore, motive does not represent a major problem in legislating against hate crimes providing for punishment enhancers only.

Accepting that motivation can be considered in determining culpability, which is a fact under many US States' hate crime laws, another problem arises. What happens if there are various motivations one of which, eg, is the racial hatred of the victim?<sup>74</sup> Does the crime automatically become a hate crime? What if the hate element is secondary to other motives?

What is important in such circumstances is not to determine the different strengths of each motivation held by the offender, but to prove that the hate element is the main reason behind the committing of the offence. This should not involve a complex analysis of the different strengths each motivation has, but for the court to ask a more simple question. That is, would the crime have been committed were it not for the fact that the victim was gay, black, disabled etc? If the answer is no, it would not have been committed, the conclusion is that the offence was bias. Therefore, under this construction, the crime occurs through a direct result of the bias motivation regardless of whether there are other motives involved.

### **The impact of "identity politics" in creating new laws**

We now turn to address the issue of "identity politics". Minority groups and other groups within society are not always heard or represented in Parliament. In order to change peoples' perceptions and awareness of social misgivings, these people must become identifiable. Those who hide or who are actively oppressed may never find a true voice with which to express their views. An increasingly powerful movement that has gathered much momentum over the past three decades has been the influence of new social movements, pressure groups and lobbyists representing the interests of the disenfranchised and minority groups. Jacobs and Potter suggest that the propagation of new hate crime laws during the 1980s and 1990s should not be attributed to insufficient criminal penalties, but to the growing influence of resulting identity politics.<sup>75</sup> It has often been argued that the hate laws which have been enacted are symbolic; they make express statements of support to the pressure groups which have lobbied for their enactment, but in real terms they have little to do with justifiable criminal sanction and everything to do with pleasing the pressure group involved.<sup>76</sup>

According to Jacobs and Potter, "laws do not spring forth from a groundswell of public opinion, but rather are the product of lobbying by interested groups that must mobilize support among politicians."<sup>77</sup> They argue that politicians support such proposals in exchange for "campaign contributions, election endorsements, or more diffuse expressions of gratitude and support". In essence, laws are thus passed by Parliament not for the good of the public, but are used as simple pawns in a political game. Jacobs and Potter go on to suggest that such laws are targeted at three audiences: (1) the lobbyists who desire the legislation; (2) the general public, as politicians convey the message that they condemn prejudice and thus have prejudice-free characters themselves, and

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<sup>73</sup> In fact, under s 21A of the *Crimes (Sentencing Procedure) Act 1999*, the courts are allowed to look specifically at the motivation of the offender.

<sup>74</sup> Jacobs and Potter, n 7 at pp 21-27 pose this question and develop a model that looks at the causal relationship link with the level of prejudice the offender holds. They argue that if merely a slight relationship is shown between the prejudice and the criminal act, a great deal of crimes would become labelled hate crimes. If this was based instead on showing a high level of prejudice motivating the offence with the exclusion of all other motivations, there would not be much hate crime. This is over-complicated and involves the assumption that hate crime is either motivated in total by prejudice, or that it is just one factor of motivation and will therefore encompass too many crimes. Yet a more effective approach, which does not overcomplicate itself, is to determine whether the crime is a hate crime by reversing this analysis. Instead of looking at the strengths of each motive, we can simply determine the main motive by asking the question: would this crime have been committed if the victim had not been of the character that the offender held prejudice towards?

<sup>75</sup> Jacobs and Potter, n 7, Ch 5.

<sup>76</sup> Jacob and Potter, n 7, Ch 5; see also Morgan, n 28.

<sup>77</sup> Jacobs and Potter, n 7, p 66.

(3) potential offenders (though this last group can be disregarded as it would take “some heroic assumptions to believe they are actually listening”). This theory of identity politics is flawed for several reasons. It first suggests that politicians are solely influenced by self-promotion and therefore do not vote to legislate for the good of the public. It also suggests that pressure groups and advocacy organisations work only to receive symbolic recognition and not meaningful legislative protection.

Identity politics does play a significant part in the legislative process. Pressure groups, lobbyists and advocacy organisations have developed for a reason. Minority groups, environmentalists, human rights organisations etc play a huge part in balancing the separation of powers. They act as a check on the government, Parliament and at times the judiciary. They provide a platform from which those who are often drowned out by the flux of day-to-day business and politics can be heard. They produce research and statistics where public funding does not exist. In doing all this, they pressure governments and Parliament to listen to the needs of certain people who cannot be heard by themselves.

Jacobs and Potter appear to object to this new influence of minority group “identity politics”. They imply that some excess influence is evidenced by hate crime laws, but disregard the extent to which political life in contemporary liberal democracies is characterised by a broad range of lobbying and policy shaped by business, sectional and other interests. If the objection is really that some less legitimate groups have now joined the lobbying fray, there may be some room to discuss the unfair impact of their power on legislatures. However, this would take us into a discussion of who is and isn’t a legitimate group which is outside the scope of this article. However, Jacobs and Potter do not appear to be making this assertion. Rather, they appear to make the general argument that introduction of many laws, including hate crime legislation, is an example of lobby groups influencing Parliament to legislate. In doing this Parliament is somehow acting with illegitimate reasons influenced by politics and not through fair criminal sanction. Yet the alternative to Jacobs and Potter’s theory is to resort to a model of a completely autonomous state that has been impervious to all historical pressures and lobbying (against the overwhelming evidence of decades of economic and political science research). This has somehow folded in relation to the influence of “identity politics” as some completely new breach of state autonomy.

Morgan argues that the impact that identity politics has on legislation is also unfair, as some minority groups band together and gain protection, while other smaller groups do not muster the might to be heard. This is naïve. It disregards the reality that without identity politics, certain groups will remain oppressed, vilified or persecuted. These groups play an integral part in gaining protection for the unprotected. Parliament will judge for itself whether they have a valid cause; that is one of the main purposes of having bicameral parliaments, standing committees and parliamentary debate. The lobbyists’ desire for legislation does not come from an over-reactive desire for recognition as Jacobs and Potter suggests, but from a recognised problem in society. In essence, the use of identity politics is a necessary part in advocating minority rights.

## THE LAW IN AUSTRALIA

### Anti-discrimination laws

There is no legislation in Australia that incorporates a violent bias attack as a specific crime. There is, however, legislation in all States and Territories, making sexuality/race etc discrimination on the grounds of harassment and/or vilification, unlawful. This means that in certain areas of life,<sup>78</sup> prescribed under the statute, people are protected by law against harassment that is dependent on their identification with a particular group of individuals. Vilification laws also protect individuals within certain identifiable groups, prescribed by the relevant statute, from being vilified in public areas.

Traditionally discrimination laws have centred on sexual harassment. However, there are now several federal and state pieces of legislation that prohibit other types of harassment, including that which is homophobic.<sup>79</sup> At the federal level, the *Disability Discrimination Act 1992* (Cth) prohibits

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<sup>78</sup> For example, employment, education, provision of services and goods, accommodation, registered clubs etc.

<sup>79</sup> For a critique of these laws, see Chapman A, “The Messages of Subordination Contained in Australian Anti-Discrimination Statutes” in Mason and Tomsen, n 43. See also Mason G, “Harm, Harassment and Sexuality” (2002) MULR 31.

discrimination based on harassment towards someone with a disability in areas including “education” and “employment”. Under ss 18B and 18C of the *Racial Discrimination Act 1975* (Cth), conduct involving hatred for people on the ground of “race, colour or national or ethnic origin” is prohibited.<sup>80</sup> However, neither federal Act includes sexuality as a basis for harassment or vilification. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) provides that the Commissioner may attempt to reconcile complaints of sexuality discrimination within the workforce.<sup>81</sup> The *Workplace Relations Act 1996* (Cth) also provides that determination of employment cannot be based on the grounds of “sexual preference” (s 170CK(2)).

All State legislatures have enacted laws that protect individuals from discrimination based on sexuality.<sup>82</sup> These laws prescribe that discriminating against a person on the grounds of her or his sexuality is unlawful. However, they will only be applicable in certain areas of life, eg “education” or “employment in the workplace” as mentioned above. Acts which specify *vilification* as unlawful are not limited to specific areas of life such as these. They will include acts that occur in the public domain. Only recently have anti-discrimination laws been amended to include “public acts” of vilification based on the grounds of sexuality. The first State to incorporate this was New South Wales. The *Anti-Discrimination (Homosexual Vilification) Amendment Act 1993* (NSW) amended the *Anti-Discrimination Act 1977* (NSW) by adding ss 49ZS-TA. This makes it “unlawful for a person, by a public act, to incite hatred towards, serious contempt for, severe ridicule of a person or group of persons on the ground of the homosexuality of the person or members of the group” (s 49ZT). Further to this, s 49ZTA states that such actions include:

- (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

The maximum penalty for this is six months imprisonment. Other States that have followed suit include the Australian Capital Territory, Queensland and Tasmania. This leaves the Northern Territory without any provision on public acts of vilification and Victoria, South Australia and Western Australia without provisions that include sexuality.<sup>83</sup>

The anti-discrimination and anti-vilification legislation is a welcomed step forward in the protection of minority groups such as gay men and lesbians. It is unfortunate that not all States have legislation that expressly includes public acts of homophobia as directly unlawful. However, while every State does have avenues of redress for victims of discrimination, there are currently exemptions in place that allow religious institutions to discriminate against people on the grounds of sexual orientation.<sup>84</sup> Further, no anti-discrimination legislation requires the referral of complaints to the police for criminal prosecution.<sup>85</sup> Such legislation does not protect victims of violent bias attacks and they do not punish perpetrators of this more violent and harmful act.

### New legislation for Australia

A new body of legislation is needed in order to combat hate crimes within Australia. It is time that the suffering encountered by victims of bias abuse and violence is recognised differently by the criminal law and that they are further protected by the criminal justice system. An examination of the different types of hate crime laws has been made previously in this article. There are various forms of

<sup>80</sup> Inserted by s 3 of the *Racial Hatred Act 1995* (Cth).

<sup>81</sup> *Human Rights and Equal Opportunity Commission Regulations* (Cth), reg 4(a)(ix). See Chapman, n 79.

<sup>82</sup> These include *Anti-Discrimination Act 1992* (NT), s 19(c); *Equal Opportunity Act 1984* (WA), s 35O; *Equal Opportunity Act 1995* (Vic), s 6(d) and 6(l); *Anti-Discrimination Act 1977* (NSW), s 49ZG; *Discrimination Act 1991* (ACT), s 7(1)(b); *Equal Opportunity Act 1984* (SA), s 29(3); *Anti-Discrimination Act 1998* (Tas), s 16(d); *Anti-Discrimination Act 1991* (Qld), s 7(N).

<sup>83</sup> Similar provisions from other jurisdictions include: *Discrimination Act 1991* (ACT), ss 66 and 67; *Anti-Discrimination Act 1991* (Qld), s 124A; *Anti-Discrimination Act 1998* (Tas), s 19 “inciting hatred”. The Commonwealth, Victoria, South Australia and Western Australia are yet to enact legislation on public acts of vilification on the grounds of sexuality but some do have statutes protecting racial vilification. Acts which prohibit vilification include: *Racial Hatred Act 1995* (Cth); *Racial Vilification Act 1996* (SA); *Racial and Religious Tolerance Act 2001* (Vic); *Equal Opportunity Act 1984* (WA).

<sup>84</sup> See *Anti-Discrimination Act 1977* (NSW), Pt 6.

<sup>85</sup> In some States, the added provision of “serious vilification” allows for criminal prosecution. However, it is only NSW and the ACT that incorporate this for “homosexuals”.

legislation producing either punishment enhancers used to automatically increase the offender's sentence, or legislation that creates new substantive laws. This article has examined the implications that substantive laws may carry, involving intent standards and motives. A new substantive law is worth consideration, but problems arise with criminal law principles of intention that may conflict with the presumed exclusion of motive. This is less the case with sentencing where motive has become an accepted part of determining sentence. New substantive law must also redefine an already existing offence in order to incorporate the bias element. This is a major and problematic task. It is problematic because it involves the reformulation of an extremely large amount of legislation.

Easier in both these regards is to legislate to create punishment enhancers. In creating punishment enhancing statutes, harsher sentences will be provided for already-defined offences. An assault occasioning actual bodily harm, which currently carries a maximum sentence of five years,<sup>86</sup> could be enhanced to 10 years. In doing this, the crime of assault occasioning actual bodily harm becomes a hate crime when it falls under one of the defined motives prescribed by the statute. While the crime itself has not been redefined from that of assault occasioning actual bodily harm, it has been redefined as more punishable. The more punishable offence will automatically carry with it a higher sentence. The judge will not determine whether a higher punishment is needed by using his own discretion with reference to aggravating features set out under s 21A of *Crimes (Sentencing Procedure) Act 1999*. The assault will have automatically become aggravated through the courts determination that the assault was motivated by a bias. In creating new hate crime legislation, the discretion to use s 21A is eliminated in respect to whether the sentence may be enhanced as the statute will automatically prescribe this.<sup>87</sup> Under Australian law, hate crime provisions may be added to certain crimes, such as assault, or even more serious crimes, such as malicious wounding with intent to cause grievous bodily harm – each of which will contain a higher penalty for the hate crime element.<sup>88</sup>

Enhanced penalty legislation should also fall into the hatred model. This means that an intent element of ill will or hostility, similar to that which is included in the UK legislation, is important. Group selection models involve proof of intention that the offender selected her or his victim because they were of a particular group. The prosecution do not need to prove that the offender held prejudice or hatred towards the victim. This leaves offenders open to wrongful accusations of hate and/or conviction of these certain crimes, leading to much higher penalties.

Let us briefly explore an example: X mugs Y, who is Jewish, because he thinks that Jewish people have more money. He does not hold ill will or hatred towards Jewish people, just a misconceived stereotype that they will carry more money. Under the group selection model, he may be convicted of a hate crime because he intentionally selected Y because Y is Jewish. He will thus receive a much harsher sentence. Yet he held no hatred towards his victim. However, he is protected from this anomaly under a hatred model. The prosecution must prove that X held an extra element of malice towards Y. If this is not apparent, then X will be sentenced for the original crime which he carried out.

The offender's intention is important to this argument. Hate crime legislation aims to reflect the brutality that many hate crimes involve. If individuals are wrongly accused of hate crimes and it is easy to prove that a crime is motivated by hate under group selection models of law, we may in fact produce the very opposite effect for which we have aimed. That is, many offences caught under this type of legislation may not be more brutal and therefore will be wrongly sentenced.

Additionally, it is important to consider what groups should be encompassed within hate crime legislation. Who in fact deserves to be protected by hate crime laws? This is not an easy task. It is

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<sup>86</sup> *Crimes Act 1900* (NSW), s 59.

<sup>87</sup> For example, in Virginia a mandatory prison term is required: "Assault and battery. A. Any person who commits a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor, and if the person intentionally selects the person against whom a simple assault is committed because of his race, religious conviction, color or national origin, the penalty upon conviction shall include a term of confinement of at least six months, 30 days of which shall be a mandatory minimum term of confinement": Code of Virginia, §18.2-57.

<sup>88</sup> This should not include murder. This is because murder already carries the maximum sentence of life imprisonment. However, it should affect non-parole periods. Other homicide cases however should include the punishment enhancement element.



important here to note that any recognised group within society who is visibly suffering from selective abuse should be incorporated under hate crime laws. Some key groups will be race, ethnicity, sexuality, disability, and religion. Other groups may or may not be incorporated dependent on certain factors, which should be:

1. The individuals within the group hold recognisable characteristics.
2. That there is evidence that levels of abuse are disproportionate to parallel offences within the general population.
3. There is evidence that crimes against this group are proportionately more severe than similar offences committed within the general population.

The author does not have definite answers for every recognisable group, indeed much by way of evaluation for specific groups would need to be made. Unfortunately, in this article there is not enough room to do that for every group. It has been evidenced here that much homophobic violence fits into each of these factors. Many more will also fit the list, which is not and should not become exclusive.

## CONCLUSION

The implementation of anti-discrimination and vilification legislation throughout Australia is an encouraging step forward in the protection of victims of hate crimes. Yet it does not go far enough. It remains an unfortunate fact that levels of homophobic violence and other hate-related crime remains high. The continued prevalence of violent attacks creates a perturbing forecast for significant change in the short term.

The severity of bias offences compels us to rethink the current law. The brutality often involved in attacks, the psychological impact on victims and the further implications this has on the particular community, and society as a whole, must not be ignored. The criminal justice system is failing victims of hate crime. Homophobic violence and many other hate crimes must be recognised under Australian law. Those who endure racial, religious or disability hatred, among others, may fall into this category. For those who are discriminatorily singled out for who they are *must* be provided with extra protection.

The introduction of new legislation proscribing bias violence and enhancing punishment proportionately reflects the severity of bias crimes. In doing this, the legislature should encompass an intent standard similar to that in many US States. Where the offender attacks her or his victim "by reason of" or "because of" their victim's sexuality, that also includes an intent standard similar to that in the UK of "hostility". Legislation should run parallel to other crimes and only become a hate crime whereby the necessary intent elements have been conclusively satisfied. If this is the case, an enhanced penalty is imposed that will apply regardless. Not only is separate legislation necessary on grounds of severity, but it is also justified for the important symbolism it consequently creates. In creating new law, the state promotes express denunciation not only of bias violence, but of prejudice itself. Obviously, legislative action needs to be supported and accompanied by complementary education campaigns.

Hate crime legislation will not completely solve the problem of homophobia and/or other prejudices in society. Indeed, history tells us that there will always be some division and hatred in our societies. The huge task of reducing hate crime will take years of cultural evolution through the changing attitudes of people, through education in schools and communities and through the continued promotion of minority group rights. Nevertheless, the criminal law can be used as a useful tool. The express denunciation created by new punishment-enhancing law that is ably supported will create a greater willingness for victims to step forward, for communities to support victims and for intolerance of prejudice to be embraced by all sectors of society.